United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4214

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4214

NICHOLAS S. NUNEZ-ORELLANA,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT AND SUPPLEMENTAL RECORD

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

ROBERT S. GROBAN, JR.,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

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P/S

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CASES CITED

RSG:ml
76-3159

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

NICHOLAS S. NUNEZ-ORELLANA, :

Petitioner, :

- v - :

IMMIGRATION AND NATURALIZATION SERVICE, : 76-4214

Respondent. :

- x

BRIEF FOR RESPONDENT AND
SUPPLEMENTAL RECORD

PRELIMINARY STATEMENT

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. §1105a, Nicholas S. Nunez-Orellana ("petitioner") petitions this Court for review of that part of a final order of deportation entered by the Board of Immigration Appeals ("Board") on August 16, 1976 which denied his application for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. §1254(h). Petitioner contends the Board's decision should be reversed because the denial of his application manifested an abuse of discretion.

It is the Immigration and Naturalization Service's ("Service") position that the Board's decision was correct and the petition for review should be dismissed because the evidence presented by petitioner in support of his application failed to establish a clear probability that he would suffer political persecution if returned to Chile.

ISSUE PRESENTED

Whether the denial by the Board of Immigration Appeals of petitioner's application for withholding of deportation constituted an abuse of discretion.

STATEMENT OF FACTS

The petitioner, Nicholas S. Nunez-Orellana, is an alien who is a native and citizen of Chile and who was admitted to the United States initially on October 8, 1971 as a nonimmigrant visitor for pleasure, authorized to remain here until January 10, 1972 (AR 29).* 1/

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* References preceeded by the letters "AR" are to the certified administrative record previously filed with this Court.

1. Section 101(a)(15)(B) of the Act, 8 U.S.C. §1101(a)(15)(B).

at the expiration of his authorized stay, petitioner failed to depart or to obtain any extension of the time in which he would be allowed to remain in this country (AR 22). As a result he has continued to work and to reside here in violation of law (AR 11).

On February 14, 1974 the Service instituted deportation proceedings against petitioner by serving him with an order to show cause and notice of hearing (AR 27). The order to show cause charged petitioner with remaining in the United States unlawfully after January 10, 1972 when his authorized stay expired[2/] and notified him to appear on March 8, 1974 at a deportation hearing to determine the validity of that allegation (Id.).

After several adjournments, petitioner's deportation proceeding commenced on December 18, 1974 before Immigration Judge Francis J. Lyons (AR 21). At the beginning of this hearing petitioner conceded the truth of the allegations contained in the order to show cause but, in response to the Judge's inquiry with respect to the country to which he wished to be deported,

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2. Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2) provides that the Attorney General can order the deportation of any alien who is in the United States in violation of the Act.

he advised the Judge that he felt he could not return to Chile for "political reasons" (AR 22-3). As a result of petitioner's assertion, Judge Lyon suspended the hearing to enable petitioner to submit an application for withholding of deportation ("the 243(h) application") [3] on the ground that he would be subject to persecution in Chile on account of his political beliefs (AR 23-4).

On January 6, 1975 petitioner's 243(h) application was submitted to the Service (AR 28). In that application petitioner stated that he feared persecution in Chile not only "because of his political opinion" but also because some of his close relatives who had opposed the present regime there had disappeared (Id.). However, pursuant to Service policy, consideration of petitioner's 243(h) application was postponed when, on March 17, 1975, he also submitted an administrative request for asylum (AR 29) [4]. In this asylum request, petitioner claimed that he could not return to Chile, not because of his political beliefs, but because many of his close relatives were involved "with political

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3. See Section 243(h) of the Act, 8 U.S.C. §1253(h) and 8 C.F.R. §242.17(c).

4. See 8 C.F.R. §108.

parties that are not favored by the present regime (and) because of their association with these political organizations and (his) relation to them (he) also would be subjected to political persecution" (AR 48). However, with the exception of petitioner's maked allegations that his wife, brother and sister-in-law had been interrogated by the Chilean authorities, no documentary or other evidence was attached to the asylum request to support these contentions (AR 29-48).

Subsequently, petitioner was interviewed with respect to his asylum request. On August 4, 1975, based on the facts developed at the interview and those contained in the request, the Service notified petitioner that it would deny the request but that, pursuant to 8 C.F.R. §108, it nevertheless would request an advisory opinion from the Department of State, Office of Refugee and Migration Affairs[5/]. On August 18, 1975 the Department of State responded, concluding that:

> "without more details we find it difficult to believe that (petitioner's) fear of persecution is well-founded, particularly since there is no indication that he himself had engaged in any political activity in Chile." (AR 50).

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5. See supplemental record, page 25 infra.

On August 28, 1975 petitioner was notified by the Service of the State Department's conclusion and of the fact that it did not preclude him from proceeding with his 243(h) application when his deportation hearing reconvened[6/].

On November 20, 1975 the Service resumed petitioner's deportation proceeding. At this hearing petitioner renewed his 243(h) application and, in the alternative, requested the privilege of voluntary departure[7/]. As was the case with his asylum request, petitioner's testimony furnished the only evidence in support of his contention that he would be persecuted for his political beliefs if forced to return to Chile (AR 20-24). In summary, this testimony alleged that petitioner's sister-in-law had been involved with the Communist Party, that she had been arrested as a result of her activities, that petitioner's wife and child had been questioned on one occasion by Chilean authorities with respect to the whereabouts of petitioner's sister-in-law and, incidentally, petitioner, and that during this one interview, petitioner's house had been searched and some American currency had been confiscated. No

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6. Ibid. at page 26, infra.

7. 8 C.F.R. §244.1.

testimonial or other evidence was presented by petitioner to substantiate these assertions. In addition, petitioner presented no evidence to illustrate his political opinions or activities (Id.). Based on this evidence Immigration Judge Lyons denied petitioner's 243(h) application concluding:

> "The simple fact is that the respondent's claim is based on a tissue of evidence which is gossamer thin. He has utterly failed to show that he fears to return to Chile by reason of fear of mistreatment by reason of his race, religion, political opinion, membership in any social class or nationality. Despite the close relationship between respondent's wife and her sister it is apparent from the claim as made that no harm has come to her other than questioning that would be of obvious interest to the police. Otherwise, she has never been arrested, mistreated in any way so far as herself. There is, therefore, no basis on which the application could be granted on the evidence submitted." (AR 12-13)

On November 25, 1975 Immigration Judge Lyons' decision was appealed to the Board of Immigration Appeals on the ground that he had failed to take judicial notice of the repressive political actions of the Chilean Government (AR 10). On August 16, 1976 the Board affirmed the Immigration Judge's decision and dismissed

the appeal noting that petitioner had "failed to show a well-founded fear that his life or freedom would be threatened in Chile on account of his race, religion, nationality, membership in a particular social group or political opinion." (AR 3-4).

Pursuant to the Board's order, petitioner was notified by the Service to depart from the United States at his own expense or before September 24, 1976 (AR 1). On September 24, 1976 petitioner filed a petition with this Court seeking to set aside the Board's decision denying his 243(h) application. Petitioner has since remained in the United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 106 (a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

* * * * *

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

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RELEVANT REGULATION

Title 8, Code of Federal Regulations

(C.F.R. §242.17)

242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation.* * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed.* * *

ARGUMENT

THE ATTORNEY GENERAL'S DECISION TO DENY PETITIONER'S 243(h) APPLICATION CONSTITUTES A PROPER EXERCISE OF DISCRETION

A. General Background

The United States Supreme Court and this Circuit have continually and steadfastly affirmed Congress' plenary power to establish criteria for the admission and expulsion of aliens. Kliendienst v. Mandel, 408 U.S. 753, 766 (1972). Pursuant to this authority Congress enacted Section 243(h) of the Act, 8 U.S.C. §1253(h), which permits the Attorney General[8/] in his discretion to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion or political opinion." Muscardin v. Immigration and Naturalization Service, 415 F.2d 865, 866 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392, 394-5 (2d Cir. 1953).

To be eligible for consideration under the provisions of Section 243(h) of the Act, an alien

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8. Section 101 of the Act, 8 U.S.C. §1101, empowers the Attorney General to delegate this responsibility. Pursuant to this power the Attorney General has delegated this responsibility to the Immigration Judge, 8 C.F.R. §242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 53.1.

must submit an application to the Immigration Judge at his deportation hearing which requests this relief and sets forth the reasons why it should be granted[9]. At this point the alien becomes an applicant for a statutory benefit and, as such, the burden of proof is upon him to demonstrate that his situation warrants favorable consideration. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929, 934 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968); Khalil v. Immigration and Naturalization Service, 457 F.2d 1276, 1277 (9th Cir. 1972). In the context of Section 243(h), this requires the alien to show not only a clear probability of persecution in the country designated for his deportation but also that this persecution, if demonstrated, would result solely from religious, racial or political reasons. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98, 100 (7th Cir. 1967); Lena v. Immigration and Naturalization Service, 379 F.2d 536, 538 (7th Cir. 1967). A mere showing of persecution in a particular country, without substantial proof as to the reasons

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9. See 8 C.F.R. §242.17(c).

behind the persecution or its relationship to the applicant, is insufficient to warrant favorable discretionary action under Section 243(h). Paul v. Immigration and Naturalization Service, 521 F.2d 194, 199-201 (5th Cir. 1975); Zamora v. Immigration and Naturalization Service, 534 F.2d 1055, 1063 (2d Cir. 1976); Cheng Kai Fu v. Immigration and Naturalization Service, supra at 753; Hyppolite v. Immigration and Naturalization Service, supra at 100.

B. The Standard Of Review

In reviewing an exercise of the Attorney General's discretionary authority under Section 243(h) of the Act, the scope of review for this Court is extremely narrow. Muskardin v. Immigration and Naturalization Service, supra at 866. It is limited to a determination of whether the decision in question manifests an abuse of discretion. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355, 359 (2d Cir. 1974); Zupicich v. Esperdy, 319 F.2d 773, 774 (2d Cir. 1973). Accordingly it precludes this Court from substituting its judgment for that of the Attorney General unless his determination is found to be without any rational explanation, to

depart inexplicably from established practices, or to rsst on an impermissible basis. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715, (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931, (S.D.N.Y. 1961), aff'd. 303 F.2d 279 (2d Cir. 1962).

Petitioner in his brief[10] has sought to convince this Court that it should expand its scope of review to include its perception of the political events in Chile. In support of this suggestion, petitioner relies upon a decision from this Court as well as one from the District Court of the Southern District in which judicial notice was taken by the respective courts of political events relating to the questions presented in each case[11]. However, neither of these cases involved judicial review of the Attorney General's denial of a Section 243(h) application. Both were concerned with whether administrative stays of deportation should have been granted to enable the relators to submit Section 243(h) applications. In this context both Courts quite properly took judicial notice of the potential dangers to the relators in determining whether stays of deportation

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10. Petitioner's brief, at page 7.

11. See, United States ex rel. Fong Foo v. Shaughnessy, 234 F.2d 715 (2d Cir. 1955) and United States ex rel. Mercer v. Esperdy, 234 F. Supp. 611 (S.D.N.Y. 1964).

should be granted since denials of these stays would have precluded both relators from submitting Section 243(h) applications to the Attorney General. Neither decision relates in any way to the standard of review set forth in Wong Wing Hang to which this Court must adhere in this proceeding. It is against this standard that petitioner's claim of abuse of discretion must be judged to ascertain whether he sustained his burden of showing a clear probability that he would be persecuted on religious, racial or political grounds if returned to Chile.

C. The Evidence Before The Attorney General Failed To Establish A Clear Probability Of Political Persecution of Petitioner In Chile.

Petitioner contends that the Attorney General's consideration and denial of his Section 243(h) application manifested an abuse of discretion because: (1) As the decision reveals, in making his determination the Attorney General failed to consider the evidence of political persecution in Chile which petitioner submitted in his behalf; and (2) even if this evidence was considered, the resultant decision, denying the application, is without rational basis. An examination of each of these contentions under the appropriate standard of review will demonstrate their lack of merit.

1. THE ATTORNEY GENERAL PROPERLY CONSIDERED ALL OF THE EVIDENCE PRESENTED

Petitioner contends initially that the consideration which the Immigration Judge and the Board of Immigration Appeals gave to his Section 243(h) application was arbitrary since both completely disregarded the political situation in Chile in reaching their conclusions with respect to his application[12/]. In this regard petitioner notes that 8 C.F.R. §242.18(a) requires an Immigration Judge to include in his decision a discussion of all evidence pertinent to any Section 243(h) application he adjudicates. Since petitioner finds both the Board's decision and the Immigration Judge's decision devoid of any reference to the political situation in Chile, he concludes that both must have ignored this situation and that this represents an arbitrary action which deprived him of a fair hearing and which should be corrected by this Court.

A similar contention was recently discussed by the Court in Paul v. Immigration and Naturalization Service, supra, at 199, which rejected it concluding:

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12. Petitioner's brief, at pages 8-9.

> "Petitioners also point to the failure of the Immigration Judge to take administrative notice of conditions in Haiti as prejudicial to their rights. But this did not deprive them of a fair hearing or constitute an abuse of discretion. Many Haitians seek refuge in this country, not for political reasons, but for economic ones.... (citation omitted) We do not minimize the claims of those who in fact flee Haiti for political reasons and legitimately fear persecution on return. Nevertheless claims are easily made. To require the INS to take administrative notice of conditions in Haiti as petitioners define them would confer 'blanket asylum status' upon those who are not in fact political refugees."

In this petition for review petitioner also seeks "blanket asylum status". Without presenting any evidence to the Attorney General with respect to his political activities or his political beliefs, petitioner contends that merely because political persecution occurs in Chile his Section 243(h) application should be approved. This contention has been rejected wherever and whenever it has been raised. Paul v. Immigration and Naturalization Service; Kasravi v. Immigration and Naturalization Service, 400 F.2d 675, 676-77 (9th Cir. 1968).

In addition, even a cursory examination of the decisions of the Immigration Judge and the Board reveal that the evidentary requirement of 8 C.F.R. §242.18(a)

was sustained in both opinions. While neither opinion discusses the political situation in Chile in great detail, such a discussion is not necessary to conform to the requirements of the regulation. What is required is "a discussion of the evidence pertinent to (the) application...." In petitioner's case the evidence pertinent to his Section 243(h) application was only that evidence which the Judge considered relevant to the issue before him namely, whether petitioner would be persecuted on political grounds if returned to Chile (See A, supra). Since this inquiry focuses primarily on petitioner's activities, and it is apparent that neither petitioner nor his family have been subjected to persecution by the Chilean Government (See C-2, infra), the relative absence of discussion in the Attorney General's opinions regarding the Chilean Government's activities is not surprising. In this context it is clear that all evidence pertinent to petitioner's Section 243(h) application was discussed and that petitioner's contentions are completely without merit.

2. ON THE BASIS OF THE EVIDENCE PRESENTED THE ATTORNEY GENERAL'S DECISION WAS PROPER.

Petitioner also contends that, even if the manner in which the Attorney General considered his Section 243(h) application was proper, nevertheless the decision denying that application manifested an abuse of discretion[13]. To support this contention petitioner points to the fact that he is the brother-in-law of an arrested communist and that he has resided in the United States for several years and submits that these factors, combined with the repressive actions of the Chilean Government toward communists, make his persecution on return to Chile a certainty. A simple review of the evidence, examined against petitioner's burden to demonstrate a clear probability that he will be persecuted for political reasons if returned to Chile, 8 C.F.R. §242.17(c); Fu v. Immigration and Naturalization Service, reveals the insubstantial nature of petitioner's contentions and establishes the propriety of the Attorney General's conclusions in this regard.

In his testimony at his deportation hearing petitioner presented factors which he believed

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13. Petitioner's brief, at pages 9-10.

made him eligible for discretionary relief under Section 243(h) of the Act. In summary those factors were as follows: (1) Petitioner claimed that his sister-in-law was a communist who disappeared after the present Chilean Government took power in September, 1973[14/] and that his relationship to her made it impossible for him to return to Chile (AR 16-7, 48); (2) Petitioner suggested that the Chilean authorities knew of him and his relationship to his sister-in-law because they had interrogated his wife and child, who reside in Chile, as to the whereabouts of his sister-in-law and because, during this interrogation, a search of his home had been made which resulted in confiscation of United States currency that he had sent to his wife (AR 18-9); (3) Petitioner noted his continued residence in this country and his exposure to a wide range of ideas and suggested that this would also subject him to persecution if he returned to Chile because the Chilean Government did not tolerate divergent opinions (AR 8-9); and (4) Petitioner contended that all of these factors, combined with the Chilean Government's repressive political activities, revealed a clear probability that he would be persecuted in Chile if he returned (AR 9). The Immigration Judge considered all of this testimony and concluded:

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14. See, The World Book Encyclopedia, volume 3, page 368 (1975).

> "The simple fact is that the (petitioner's) claim is based on a tissue of evidence which is gossamer thin. He has utterly failed to show that he fears to return to Chile by reason of fear of mistreatment by reason of his race, religion, political opinion, membership in any social class or nationality. Despite the close relationship between (petitioner's) wife and her sister it is apparent from the claim as made that no harm has come to her other than questioning that would be of obvious interest to the police. Otherwise, she has never been arrested, mistreated in any way so far as herself. There is, therefore, no basis on which the application could be granted on the evidence submitted." (AR 13).

The reasonableness of this conclusion is enhanced by several factors. Initially, it is apparent that no corroborative evidence was presented to the Judge to support petitioner's contentions. This entitled the Immigration Judge to disbelieve petitioner's testimony and precluded petitioner from satisfying his burden of proof under Section 243(h) of the Act. Khahil v. District Director, supra, at 1277; Lena v. Immigration and Naturalization Service, supra at 537-38. In addition, as the Board of Immigration Appeals and Immigration Judge noted, petitioner submitted no evidence at his deportation hearing or in his Section 243(h) application which related to his political opinions or

activities. Thus, while the Immigration Judge had evidence before him with respect to the political situation in Chile, he had no evidence before him which supported the reasonableness of petitioner's fear that he would be persecuted for political reasons in Chile. This also precluded petitioner from qualifying for discretionary relief under Section 243(h) of the Act. Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 107 (9th Cir. 1969). Finally, from September, 1973 when the present Chilean Government took power until February 14, 1974 when the Service instituted deportation proceedings against petitioner, it is interesting that despite petitioner's professed fear of the Chilean Government, he made no attempts to get his family out of Chile or to apply for asylum in this country until it constituted a defense to deportation. On the basis of these factors, as well as the total absence of proof as to petitioner's claim of anticipated persecution in Chile, it is respectfully submitted that the Attorney General's decision denying petitioner's Section 243(h) application was a proper exercise of discretion which should be affirmed by this Court.

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CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Respectfully submitted,

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York
Attorney for Respondent

ROBERT S. GROBAN, Jr.,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel

RSG:ml
76-3159

SUPPLEMENTAL RECORD

SC:ml UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NICHOLAS S. NUNEZ-ORELLANA,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

STIPULATION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Docket No. 76-4214

IT IS HEREBY STIPULATED AND AGREED by the parties to this review proceeding that the following documents shall be added to, and made part of, the certified administrative record in this proceeding: (1) August 4, 1975 letter from Service to State Department's Office of Refugee and Migration Affairs, and (2) Augusut 28, 1975 letter from Service to petitioner.

Dated: New York, New York

December 13, 1976

S/ ROBERT F. GREENSTONE

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Attorneys for Petitioner
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By: S/ ROBERT S. GROBAN, Jr.

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One St. Andrew's Plaza
New York, New York 10007

20 West Broadway
New York, New York 10007

A21 756 115[illegible]/AJL

August 4, 1975

Dear Sir:

Reference is made to your request for asylum submitted on March 17, 1975.

This Service has determined that there is no basis for granting your request and has forwarded your application for an advisory opinion to the Department of State. You will be further advised.

Sincerely yours,

Maurice F. Kiley
District Director
New York District

CC: Pollack & Kaufman, Esq.
225 Broadway
New York, NY 10007

MJM/ec

20 West Broadway
New York, New York 10007

A21 756 115DB/AJL

August 28, 1975

Nicolaos Segundo Nunez-Orellana
39 Neulist Avenue
Port Washington, N.Y. 11550

Dear Mr. Nunez-Orellana:

Reference is made to your request for political asylum filed on March 17, 1975.

In consultation with the Department of State, this Service has determined that there is no basis for granting your request for political asylum.

This finding does not preclude you from filing an application under Section 243 (h) of the Immigration and Nationality Act at the time of your deportation hearing, if you so desire.

Very truly yours,

Maurice F. Kiley
District Director
New York District

CC: Pollack & Kramer, Esq.
225 Broadway
New York, NY 10007

AJL/ec

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-4214

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

15th day of December, 1976 she served a copy of the within Brief for Respondent and Supplemental Record

by placing the same in a properly postpaid franked envelope addressed:

Pollack & Kramer, Esquires
225 Broadway
New York, New York 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

15th day of December, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978